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Andrew Symon BJM legal column 2018-03

Threatening incarceration for pregnant women who drink alcohol or take drugs

We “are announcing an immediate crackdown policy of civilly prosecuting any expecting mothers found to be using dangerous drugs or alcohol.... In the event there are provable violations of any such protective court orders, the State will further prosecute on a contempt basis and seek incarceration in order to incapacitate the... mother.”

This recent press release from a county attorney’s office in Montana is a worrying example of the inclination to treat a sensitive health issue as a legal matter. There is something of a history of this in the USA, with several states having policies that create treatment facilities for pregnant women with alcohol problems, but which also use the threat of criminal prosecution (Thomas et al 2006). Lollar (2016) reports that a woman in Tennessee was arrested two days after giving birth and charged with assaulting her newborn child because she had taken narcotics during pregnancy.

The Big Horn County (Montana) press release goes on:

“(We) are asking the public to report any known instances of pregnant females using drugs or alcohol... Expecting mothers acknowledging their own drug or alcohol addiction problems should immediately self-report to... enroll in daily substance abuse monitoring in order to avoid prosecution....”

Goare (2018) notes that this is an extension in Big Horn County of a zero-tolerance policy for methamphetamine implemented by the county attorney, ‘Jay’ Harris, in 2015. The essential justification for the two policies rests on an interpretation of the legal concept known as ‘Natural law’. According to the press release this “provides that all human beings are afforded inherent legal rights by virtue of their humanity.” In this interpretation, the right of the fetus not to be born affected by teratogens can be enacted by legally controlling what the pregnant woman consumes. Some have claimed that the ‘obstetric police’ in the USA are determined to over-rule women’s expressly stated wishes in favour of ‘fetal rights’ (Meredith 2016). Others have likened the Montana case to Margaret Atwood’s *The Handmaid’s Tale* (Smith 2018), a futuristic American dystopia in which women’s rights are severely restricted.

Is there any justification for the approach proposed in Big Horn County?

Goare (2018) reports that Montana has one of the highest rates of pregnant women using alcohol in the north-western part of the USA. Smith (2018) notes that the population of Big Horn County is 60% Native American, with the county attorney asserting that he raised this

issue after the Crow Tribe's legislative branch brought it to his attention in 2015. Estimations of alcohol consumption during pregnancy among the heterogeneous American Indian/Alaska Native (AIAN) populations of the United States vary significantly, according to Montag et al (2015). They cite various studies reporting rates ranging from 14% for 'reservation residing pregnant women', to 36% for urban women, and 53.4% at one Northern Plains antenatal clinic. These figures are contrasted with an overall rate in the USA of 7.4%. In addition, Wilson (2018) notes that the Department of Public Health and Human Services in Montana recorded a trebling of the rate of newborn babies displaying symptoms of drug withdrawal between 2008 and 2015. Clearly, significant problems exist, and no one is suggesting that efforts shouldn't be made to prevent or minimise teratogenic harm, although it's questionable whether any use of alcohol should be treated as if it were an addiction. In the UK, pregnant women are advised not to consume alcohol or take non-prescribed medication. However, the big question is whether this should be dealt with as a health issue or a legal one. Is compulsory daily monitoring of pregnant women, with the option of incarceration 'to incapacitate' them, the answer? If you regard this as a health issue, you would be agreeing with the group National Advocates for Pregnant Women, whose statement in response to this issue urged "every medical and public health provider in Big Horn County to immediately oppose this dangerous, unethical, and counterproductive policy" (NAPW 2018).

Reaching for legal sanctions when dealing with pregnant women does not only occur in the USA. Examples from elsewhere demonstrate the tendency to use legal powers to determine the actions or choices of pregnant women. These include a woman being forcibly taken from her home in Brazil in order to have a caesarean section (Symon 2014b), restrictions of home birth options in the Czech Republic (Symon 2012), the effective criminalisation of home birth in Hungary (Symon 2010) and the on-going tragedy of the Hungarian state's prosecution of Agnes Gereb (Grace 2018) [see link to a petition regarding Agnes Gereb at the end of this article]. Such moves can easily be characterised as yet another example of patriarchal systems trying to control women.

In 2014 an English local authority, acting on behalf of a seven-year old girl, sought to claim damages from the Criminal Injuries Compensation Authority (Symon 2014a). To succeed, it would have had to show that the mother's consumption of alcohol during pregnancy was a criminal act. That, in turn, would have left the door open to the mother being prosecuted. The claim was unsuccessful. The view that this issue should be viewed through a legal prism has not gained much traction in the UK.

Still the essential question is: is the threat of criminal sanction an effective mechanism to reduce or deal with harm? In Montana, county attorney Harris appears to believe his policy will encourage women to take advantage of treatment services. This raises two questions: firstly, is there capacity to cope with the additional workload if this policy is enforced? And secondly, assuming there is such capacity, would the policy actually work?

An answer to the first question is given by Caitlinn Borgmann, executive director of the Montana Human Rights Network. She says that, despite a new, eight-bed treatment centre being opened that is specifically for pregnant women struggling with addiction, this is nowhere near enough: "You might go to the top of the list, but there's still ten women in front of you. There's not a lot of space" (cited by Wilson 2018).

Borgmann goes on to answer the second question:

"If a woman is concerned that she will be prosecuted when it is discovered that she is both pregnant and struggling with chemical dependencies ... she's not going to get treatment." (ibid)

This view is endorsed by the NAPW, who report that "there is zero scientific evidence supporting policies of coercion and punishment directed to pregnant women. Such policies in fact discourage women from seeking health care and could coerce women in to having unwanted abortions".

Wanting to prevent harm to the developing fetus is not a controversial goal. The question is how best to deal with the issue of pregnant women drinking alcohol (which is legal) or taking illicit drugs (which is not). There are obviously contextual differences which mean that the Montana scenario would not be transplanted wholesale to the UK. Nevertheless, in the UK some pregnant women continue to drink alcohol, and / or take drugs. The approach adopted within the NHS is to seek the woman's co-operation, advise her about the likely effects these substances will have on her and on her unborn baby, and involve other appropriate health or social agencies in an attempt to minimise or remove the risk of harm. Threatening incarceration, particularly 'to incapacitate' the mother, is a route most health practitioners in the UK would probably not want to go down.

Petition to support Agnes Gereb: { HYPERLINK "https://www.change.org/p/everyone-freedom-for-agnes?recruiter=18022064&utm_source=share_petition&utm_medium=copylink&utm_campaign=share_petition&utm_term=share_petition" \t "_blank" }

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